IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5844 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NAVSARI COTTON & SILK MILLS LTD.

Versus

EMPLOYEES' STATE INSURANCE CORPORATION

Appearance:

1. Special Civil Application No. 5844 of 2002

MR AK CLERK for Petitioner No. 1-2

MR SHASHIKANT S GADE for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 12/08/2002

ORAL JUDGEMENT

1. The petitioner has approached this Court under Article 226 of the Constitution of India praying for quashing and setting aside the demand for Employees State

Insurance Contribution made by the Employees' State Insurance Corporation (hereinafter referred to as "the Corporation") vide its communication dated 8th February, 2002 to the tune of Rs.27,72,291.54 for the period between 1st July, 1997 to 31st January, 2002.

1.1. The facts in short can be stated as under :-

1.2. Petitioner no.1 - Navsari Cotton & Silk Mills Ltd., is declared sick company under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. It has been declared as such by the Board for Industrial & Financial Reconstruction (BIFR for short) under Sick Industrial Companies (Special Provisions) Act, 1985 (SICA for short). Petitioner no.2 is a representative and approved union for the concerned industry for the concerned local area and it is the sole bargaining agent on behalf of the employees of petitioner no.1. Upon the declaration of petitioner no.1 - Company as sick company, petitioner no.2 proposed a scheme for revival and rehabilitation of the same and the said scheme was sanctioned by the BIFR on 5th December, 1996. Since then the scheme of revival and rehabilitation is in operation. For the purpose of sponsor of the aforesaid scheme the workers of petitioner no.1 has formed a society under the provisions of the Gujarat Co-operative Societies Act and it is named as Shri Morarji Textile Labour Co-operative Industries Ltd. The Board of Directors of petitioner no.1 comprises seven Directors of which three are nominated by the aforesaid Co-operative Society, one Director each of the Industrial Development Bank India (I.D.B.I.), Union Bank of India and of the Government of Gujarat has been nominated and one nominated Director of BIFR. The petitioner - Mill is at present employing about 500 workers and the working of the mill under the scheme is constantly being monitored by the I.D.B.I. as the operating agency and the BIFR.

1.3. According to the petitioner, the Inspector appointed under the provisions of E.S.I. Act, 1948 visited the mill premises on 4th February, 2002 to 8th February, 2002 and inspected the books & records of petitioner no.1. The said inspector also prepared observation slip dated 8th February, 2002 bearing no.4503. The petitioner - Mill has been called upon to pay an amount of Rs.27,72,291.54 by way of E.S.I. Contribution on the strength of the said slip. This amount has been calculated on the basis of 6.5% on the wages paid to the employees from 1st July, 1997 to 31st January, 2002. In response to the said demand petitioner no.1 immediately gave reply to the Regional Director,

Regional Office, Surat Region, at Surat dated 8th February, 2002 bringing to his notice that petitioner no.1 is sick industrial company and that it is running under a sanctioned scheme. As per the provisions of Section 22 of (S.I.C.A.) no financial recovery can be made from petitioner no.1. According to the petitioners the said scheme has been sponsored by the employees themselves by forming a Co-operative as stated above and the scheme proposed by them has been sanctioned by the BIFR and which at present is in operation and implementation. As a result of the scheme being in operation about 500 employees have received employment. It is the say of the petitioners that petitioner no.1 is at present granted protection under the provisions of Section 21 to 22 (1) of S.I.C.A. and no recovery can be made of the E.S.I. Contribution as the same has financial implications on the scheme. Moreover, it has been pointed out by the petitioners that E.S.I. Act has been enacted for the benefit of the employees themselves. However, when the employees do not intend to receive benefit of that Act there is no need for the authorities under the E.S.I. Act to insist upon the payment of the E.S.I. contribution. That it is further the case of the petitioners that when no provisions in the scheme which is under implementation is made with regard to payment of contribution under E.S.I. Act, the authorities thereunder cannot take any step to recover the same from the industry. Precisely for that reason petitioner no.1 has not deducted any amount by way of E.S.I. contribution from the wages of the employees for the relevant period and the employees have not objected to the same. On the strength of these averments the aforestated main relief has been claimed by the petitioners together with certain incidental reliefs.

1.5. Upon admission of the petition, respondent has appeared through its counsel Mr.S.S. Gade. It has also filed affidavit-in-reply to the petition. It has been filed by Legal Inspector of E.S.I. Corporation. In the said affidavit-in-reply the averments made by the petitioner in the petition have been denied. It has mainly contended that the present petition is not maintainable because the petitioners have alternative and efficacious remedy elsewhere. The petitioner under Article 226 of the Constitution of India cannot avail the writ jurisdiction ignoring the E.S.I.Court constituted under Section 74 of the E.S.I. Act. This is nothing but abuse of process of law. According to the respondent under Section 74 of the E.S.I. Act the E.S.I. Courts is established and if the petitioner have any grievance they have to first approach that Court and seek appropriate

relief from it. The said Court is exclusive and special forum wherein all kinds of disputes and issues can be adjudicated upon. In support of the said averments respondent has also placed reliance on two judgments of this Court. A copy of which have been annexed to the affidavit-in-reply. It has been further averred that the E.S.I. Contribution is a statutory due and it is required to be compulsorily paid by petitioner no.1 under the provisions of Section 40 of the E.S.I. Act and petitioners cannot avoid the payment on the ground that the workers do not wish to have benefit under the E.S.I. Act. The respondent has further averred that upon visit of the Inspector of petitioner no.1 on 8th February, 2002 it was found that Rs.27,72,291.54 were the dues payable by petitioner no.1 towards the E.S.I. Contribution for period between 1st July, 1997 to 31st January, 2002. It has been further averred that since these are statutory dues the BIFR under Section 22 of S.I.C.A will not come in the way of the recovery of that amount. Ultimately, on the strength of these averments respondent has prayed for dismissal of the petition.

2. I have heard Mr.A.K. Clerk learned counsel for the petitioners and Mr.S.S. Gade learned counsel for the respondent extensively. I have also perused record of this petition carefully. Mr.Clerk has submitted that petitioner no.1 is declared sick company under the provisions of S.I.C.A. by the BIFR. It is running under the scheme sponsored by the workers who have formed themselves into a Co-operative Society and the said scheme is under operation and implementation and also under constant supervision of the I.D.B.I. as well as BIFR. He has further submitted that by virtue of the protection granted under the provisions of Section 22 (1) of the S.I.C.A. respondent cannot demand the E.S.I. Contribution amount from petitioner no.1 unless it has approached the BIFR and obtain its consent for the same. In support of this contention, Mr.Clerk has also placed reliance on certain judgments which I will revert to in the course of this judgment. Mr.Clerk has also submitted that the E.S.I. Act is meant for the welfare and benefit of the employees. However, considering the fact that it is the employees of petitioner no.1 who have formed this Co-operative and they are running the mill under the peculiar circumstances, they have decided not to avail of any benefit under the E.S.I. Act. For that precise reason no amount towards E.S.I. Contribution is being deducted from the wages of the workers working in petitioner no.1. He has also submitted that the scheme of revival and rehabilitation is in the process and as it is the mill is finding it difficult to generate enough

financial resources to carry out its functions, in that event if the petitioner - mill is required to pay sum of Rs.27,72,291.54 it will definitely result into a disaster for the mill and its scheme of revival and rehabilitation will suffer a serious setback. He has, therefore, submitted that looking to the peculiar circumstances, the respondent be prevented from taking any coercive measures to recover the aforesaid amount. So far the question with regard to alternative remedy is concerned, he has submitted that since the recovery of the present nature is covered under the provisions of Section 22 of S.I.C.A. the application of E.S.I. Act stands suspended for that purpose for the time being and in that view of the matter, petitioners cannot resort to any remedy provided under the Act and the only remedy which can be said to be efficacious will be writ petition under Article 226 of the Constitution of India before this Court.

2.1. As against that Mr.Gade learned counsel for the respondent has put emphasis on the contentions raised in the affidavit-in-reply to the effect that the petitioners have equally efficacious alternative remedy and on that sole ground this petition is required to be dismissed. According to Mr.Gade the Court established under the provision of E.S.I. Act is the appropriate forum before which present dispute can be agitated. He has further submitted that even this Court on earlier occasions has laid down that appropriate remedy is provided under the E.S.I. Act and the aggrieved party has first to exhaust that remedy only thereafter it can approach this Court under Article 226 of the Constitution of India.

2.2. The first contention of Mr.Clerk is with regard to the protective coverage provided to petitioner no.1 by virtue of provisions of Section 22 of S.I.C.A. He has drawn my attention to the said provisions. The relevant part for the decision of this petition can be reproduced as under :-

SECTION 22 (1) :-

SUSPENSION OF LEGAL PROCEEDINGS, CONTRACTS ETC,

(1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the

Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding-up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a Receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be produced with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

2.3. Mr.Clerk has drawn my attention to the non-obstante clause used in the Section and also to the phrase "No other law" and has submitted that this provision has overriding effect from all other provision including E.S.I. Act, 1948 and he has further drawn my attention to the statute for recovery of money accruing in this Section and has submitted that the recovery of E.S.I. Contribution dues will also stand covered under this provision and, therefore, the respondent cannot take steps to recover this amount from petitioner no.1. From the plain reading of this provision it clearly appears that it has overriding effect vis-a-vis all other statute including the E.S.I. Act and if the action of the authority under such Act for the recovery of money from the sick company is sought to be taken this provision will certainly come to the aid of such sick company. It can be seen here that respondent has sought to enforce the recovery of Rs.27,72,291.54 by making demand based on the aforesaid note. Such recovery in view of Section 22 (1) of the S.I.C.A. cannot be permitted to be made. In such even, the concerned authority has first to approach the BIFR or the Appellate authority under S.I.C.A. as the case may be and obtain its consent to initiate such action and recover the amount. In the present case, it is not the case of the respondent that it has already approached the BIFR and obtained its consent to recover the aforesaid amount from petitioner no.1. If that be so, it is required to be prevented from effecting recovery by passing appropriate order. For that purpose the decisions cited by Mr.Clerk are required to be looked into. In the case of F.A. Potnis v. National Textile Corporation (Gujarat) Ltd., reported in 2001 (III) C.L.R. at page 508, the learned Single Judge has considered the provisions of Section 22 of S.I.C.A. vis-a-vis the

demand of the workers for increment in wages. While following the decision of the Division Bench of this Court rendered in the group of 12 Letters Patent Appeals, the learned Single Judge has observed as under :-

> "27. I have considered the entire legal position as contended by the learned counsel for the parties. The Division Bench of this Court has decided 12 L.P.As. (a group of L.P.As.) by common judgment and in the order dated 27/5/2000 in the case of Abad Dairy (supra) after considering the legal position in the several decisions of the Supreme Court and this Court and settled legal proposition that the reliefs of regularisation and back wages claimed by the workmen in those petitions should have been refused. The word "back wages" includes employment and hence on the basis of the decision of the Division Bench of this Court, the petitioner cannot be allowed to raise this question unless the BIFR has permitted. In the present case, the company is declared as sick and in view of the legal position discussed above, the wages include increments as claimed by the petitioner cannot be allowed unless the BIFR has permitted the petitioner to raise the same."

In the case of Abad Dairy v. Manjibhai Dhanjibhai reported in 2000 (3) G.L.H. 409 the Division Bench of this Court has held as under :-

> "We find that learned Judge has failed to consider several important legal and factual aspects including as substitutes. The Unit has been declared "sick" and is now under the Board for Industrial and Financial Reconstruction. It is now governed by the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. Because of steep fall in its business, there is no sufficient work with the employer, the Unit is under the grinding financial strain and unable to sustain the burden of employment of large number of Badli workers as regular employees hence wages and monetary benefits from retrospective dates could not have been awarded in their favour. These circumstances, in our considered opinion are very much relevant for which the relief of regularisation and back wages claimed by the workmen in these petitions, should have been refused.

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No employer whose unit has been declared sick and is under the Board for Industrial and Financial Reconstruction can be directed to regularise substitute or casual and pay them back wages."

Similar view has been also taken by the Punjab and Haryana High Court in the case of Cement Corporation of India v. Presiding Officer, C.G.I.T. reported in 2002 LAB.I.C. at page 382.

The Apex Court has in the decision rendered in the case of N.T.C. (IDA) Empl. Association v. Union of India reported in 1998 LAB.I.C. at page 2766 observed as follows :-

"3. It is not disputed that the concerned subsidiaries of National Textile Corporation where the petitioners are working are sick units and they are before the Board for Industrial and Financial Reconstruction functioning under the provisions of Sick Industrial Companies (Special Provisions) Act, 1985. Learned Additional Solicitor General Mr.Reddy stated that whatever benefits are available under the O.M. can be made available to them. However, because of the aforesaid Clause-13 at present the said relief cannot be granted to them as the revival package question is pending before the B.I.F.R. When this was pointed out to learned Senior Counsel for the petitioner - association he requested us to adjourn these cases for some time to enable the employees concerned to approach the B.I.F.R. for getting appropriate clearance in this connection. He vehemently contended that despite the concerned subsidiaries where there employees are working are sick units, and as such they are before the B.I.F.R. at least 90 per cent of their own employees who are covered by the C.D.A. pattern have been given the benefits of pay hike from time to time along with further hike in the light of the recommendations of the 4th and 5th Central Pay Commissions and only for these employees represented by petitioner - association such reliefs are not granted and, therefore, according to him, they are being discriminated against. In our view, all these disputes may not survive if the petitioner association makes appropriate application before B.I.F.R. for getting clearance in connection with the

> implementation of the benefits flowing from the said O.M. dated 19/7/1995, as admittedly such benefits are available to them but will have to be cleared by the B.I.F.R. for being actually implemented and made available to them. We also make it clear that apart from the employees represented by the petitioner - association in this SLP and those of the employees referred to in the I.As. for intervention, any other similarly situated employees who might have approached various High Courts where their writ petitions are pending and who are similarly circumscribed, may also approach B.I.F.R. for ventilating their grievance. All such applications will obviously be considered by the B.I.F.R. if the employees concerned approach for getting clearance from the B.I.F.R. This SLP will therefore, stand adjourned at present. In the meantime, the petitioner - association and other employees concerned, if so advised, may file appropriate applications before the B.I.F.R. We have not the least doubt that the B.I.F.R. will consider their grievance which are pending since long and will do the needful in the matter after hearing the parties concerned."

2.4. In a recent decision rendered by me dated 25th July, 2002 in the case of this very petitioner - company and petitioner no.2 in Special Civil Application no.6443/2001 and its cognate matters in respect of the claim of the workman for reinstatement and backwages, I have taken similar view as taken by the Apex Court, this Court and the Punjab & Haryana High Court in the aforesaid cases. If that analogy is applied to the claim of the respondent the same conclusion will have to be drawn namely that such claim is not maintainable in law till the time protection afforded to the sick company under Section 22 (1) of the S.I.C.A. is in force, unless the consent of the BIFR or the Appellate authority as the case may be is obtained under that provision. As can be seen from the record of this petition, no consent has been obtained by the respondent for recovering from Petitioner no.1 the E.S.I. dues under the E.S.I. Act.

3. The second aspect of this case is very peculiar. As stated above, the workers of this very petitioner company have formed Co-operative under the provisions of the Co-operative Act to propose a scheme for the revival and rehabilitation of the sick company i.e. petitioner no.1. Considering the merits of the scheme, its future prospects and the potential viability, the BIFR has

sanctioned it and under the supervision of I.D.B.I. and under the constant vigil of the BIFR the scheme is being operated and implemented with the aid of about 500 workers. Therefore, the first and foremost aim of the workers of petitioner no.1 is to implement the scheme successfully and to bring the Company on its feet again. Naturally for this purpose sizeable amount of finance is required. It is a matter of common knowledge that it is very difficult to generate the requisite finance and for the workers who have ventured to carry out this difficult task, the things would be little more difficult. Mr.Clerk for the petitioners has made a statement at the bar that though E.S.I. Act is meant for their benefit, considering the present circumstances, the workers are not inclined to have that benefit and for that very reason no amount towards E.S.I. Contribution is being deducted from their wages also. Mr.Gade, the learned counsel for the respondent has submitted that the choice of the workers not to avail the benefit of E.S.I. contribution is not to be seen, since these are the statutory dues, the company is required to comply with requirements of the E.S.I. Act and if that is not done, the company must face the consequences. I am not inclined to accept this submission of Mr.Gade. Considering the very special facts of this case where the workers have mustered courage to accomplish a very difficult task it is required to be encouraged. Technically speaking Mr.Gade is correct when he submits that these are all statutory dues and they are meant for the welfare of the workers. However, one should not forget the real spirit and essence of such beneficial legislation. In this case also, if recovery of dues is made, its benefit under the E.S.I. Act will ultimately go to those very workers of the company who are trying hard to revive and rehabilitate it. Even for operating part of the industry, substantial amount of finance is required. Even the healthy companies find it difficult to do so. One can easily imagine the plight of the sick company. In such event, if the company is saddled with the burden of depositing the contribution of a sum of Rs.27,72,291.54 towards E.S.I. dues, it is bound to suffer substantial setback. In other words when the petitioner - Company is trying to be on its feet, the respondent is out to remove the very ground on which it is making such efforts. This will result into causing more harm to the overall interest of workers than the benefit which may be given to them under the E.S.I. Act. That is not the spirit of this Act. The respondent is also expected to take into consideration the peculiar circumstances and to reconcile to this special situation. Commendable effort put in by the workers to pour life

into the industry which is almost dead cannot allowed to be frustrated in this manner.

3.1. As has been rightly pointed out by Mr.Clerk that this is not going to continue for all time to come. For the present the respondent is merely required to defer its demand under the E.S.I. Act of Contribution from petitioner no.1. The protection granted under Section 22 (1) of S.I.C.A. is not everlasting and it even does not adversely affect the question of limitation. In these circumstances the respondent is required to be prevented from taking any action against he petitioner company for the recovery of the aforesaid amount.

4. This brings me to the contention of Mr.Gade, learned counsel for the respondent, that the present petition is not maintainable under Article 226 of the Constitution of India as equally efficacious alternative remedy is available to the petitioner by approaching the special Court, namely, the Employees Insurance Court established under the provisions of E.S.I. Act. Mr.Gade has also drawn my attention to Section 74 of the E.S.I. Act which relates to the constitution of the Employees Insurance Court. He has stated that by virtue of the provisions of Sub-section (1) of section 74 the State Government has constituted such Court for the concerned area. He has also drawn my attention to the provisions of Section 75 of the E.S.I. Act, which deals with matters to be decided by Employees Insurance Court. In support of the contention he has placed reliance on the order passed by the Division Bench of this Court in Special Civil Application No.4524/1988 dated 5th September, 1988 whereby the aggrieved party of that case is directed to approach the appropriate forum i.e. the Employees Insurance Court. If this order is perused it will show that the same has been passed with the consent of the petitioner and it is the learned counsel for the petitioner in that case who had sought permission of the Court for withdrawal of that petition with a view to availing of the alternative remedy by approaching the Court constituted under Section 74 of the Act. In this matter no such concession has been given by the learned counsel for the petitioner. Not only that but his submission is that petition under Article 226 of the Constitution of India is the only efficacious remedy and no useful purpose will be served by driving the petitioner to resort to remedy provided under the E.S.I. Act. This order of the Division Bench of this Court is not therefore, of any help to Mr.Gade. He has also placed reliance on the oral judgment rendered by the Division Bench of this Court in First Appeal No.4553/1999

with Civil Application No.7202/1999 dated 8th July, 2002. This judgment is concerning the question regarding the provisions of Section 75 (2) (b) of E.S.I. Act which require deposit of 50% of the amount due from principal employer as precondition before adjudication of dispute referred to in Section 75 sub-section (1) of the E.S.I. Act and also other claims which that Court under that Section is empowered to adjudicate upon. In this case there is no issue involved. I do not find any material in this judgment which may lend support to this submission of Mr.Gade.

4.1. Apart from this, when by virtue of prohibition imposed by Section 22 (1) of the S.I.C.A. the application of this statute gets suspended, the petitioner cannot be directed to resort to the remedy provided under the E.S.I. Act. I therefore, do not find any merit in the submission of Mr.Gade that present petition is not maintainable because alternative efficacious remedy is available to the petitioner. In view of the aforesaid discussion this petition is required to be allowed and the reliefs claimed therein are required to be granted. The demand of the respondent for E.S.I. Contribution vide observation slip dated 8th February, 2002 to the tune of Rs.27,72,291.54 for the period between 1st July, 1997 to 31st January, 2002 is quashed and set-aside. The respondent is directed not to make any recovery pursuant to the notice issued by it which have been placed on record of this petition by way of amendment by the petitioner. Rule is made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

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